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Supreme Court, U.S.
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Supreme Court of the United States

No. _____

OCTOBER TERM, 1992

HAROLD KONIGSBERG,

Petitioner,

– AGAINST –

ROBERT H. KULMANN,
WARDEN SULLIVAN CORRECTIONAL FACILITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the prosecution summation denied Konigsberg a fair trail?

2. Whether Konigsberg was deprived of a fair and impartial jury and was denied due process of law and a fair trial under the 5th, 6th, and 14th Amendments to the United States Constitution as a result of improper third party communications to several jurors ?

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IN THE
SUPREME COURT OF THE UNITED STATES
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HAROLD KONIGSBERG,

Petitioner,

-against-

ROBERT H. KULMANN, WARDEN
SULLIVAN CORRECTIONAL
FACILITY

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Harold Konigsberg, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, dated September 24, 1992.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit affirming the dismissal of his petition for habeas corpus is annexed hereto as appendix "A".

JURISDICTION

The order of the Court of Appeals is dated September 24, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the prosecution summation denied Konigsberg a fair trail?

2. Whether Konigsberg was deprived of a fair and impartial jury and was denied due process of law and a fair trial under the 5th, 6th, and 14th Amendments to the United States Constitution as a result of improper third party communications to several jurors ?

CONSITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamouse crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, with due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Sixth Amendment

In all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Constitution, 14th Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its juridiction the equal protection of the laws.

STATEMENT OF THE CASE

THE RECORD

The record of the Court of Appeals consists of all filed documents as well as the minutes of trial and sentence.

PROCEDURAL HISTORY

Petitioner Konigsberg was convicted

of Murder in the Second Degree in the County Court, Ulster County, Supreme Court, New York. That conviction was reversed by the Appellate Division: Third department. People v. Provenzano, 79 A.D.2d 811 (3rd Dept. 1980).

Petitioner Konigsberg was again convicted in the County Court, County of Ulster New York on November 24, 1982 of the crime of Second Degree murder and was sentenced to life imprisonment. The Supreme Court of the State of New York, Apellate Division, Third Department affirmed the conviction in an opinion dated May 12, 1988. Also in 1988, the New York Court of Appeals denied leave to that Court. People v. Konigsberg, 72 N.Y.2d 912 (1988). A request for reconsideration of the denial of leave was also denied People V. Konigsberg, 72 N.Y.2d 1046 (1988).

In 1989, Konigsberg filed a 28 U.S.C. Sec. 2254 motion, which on or about Januray 6, 1992 was denied and his petition for habeas corpus dismissed by the District Court, Northern District of New York (CHOLAKIS, J.)

The District Court granted a certificate of probable cause and the matter was appealed to the United States Court of Appeals which on September 24, 1992 affirmed the decision of the District Court.

THE FACTS

Harold Konigsberg was convicted of the presumed murder of Anthony Castellito, who was last seen on June 5, 6, or 7, 1961. Castellito's whereabouts have never been discovered.

SALVATORE SINNO

The prosecution relied primarily on the testimony of Salvatore Sinno. Sinno, also know as Charles Morelli, Charles Caputo, Pinto and Mr. J. Fusco, testified that in May or June 1961 he was present at a meeting with Konigsberg and others at which time Konigsberg stated that he was going "to do away with" Mr.

Castellito.* Sinno further testified that the contract for the killing was ordered by Anthony Provenzano for $15,000. Sinno admitted that he never saw Provenzano give Konigsberg the money for the killing, but testified over Konigsberg's objection that he saw Mr. Provenzano hand Konigsberg a sealed envelope which Sinno "imagined" contained money.**

Sinno's story was that he approached Castellito to lure him to the latter's upstate house by asking him to do Provenzano a favor by allowing a friend

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* In addition to Sinno being granted immunity by both Federal and State authorities and receiving a monthly income of $920.00 under the Federal Witness Program, Sinno is also an admitted truck hijacker, perjurer, convicted shoplifter, gambler, bookmaker and corrupter of public officials who admitted to having made payments of $3,000 a week to State Officials for protection of illicit gambling in New Jersey.

** In its opening the prosecution stated that Provenzano ordered the killing of Anthony Castellito as he was a rival teamster leader. This theory was never proven at trial. To the contrary, a prosecution witness, J.W. Dildine, who at the time of trial was recording secretary and business agent of the local, stated that Castellito was not a rival of Provenzano. Dildine further testified that the Executive Board of the union could have removed Castellito from office if it chose as he was appointed to the office and not elected.

who was in trouble to stay in the house.* Sinno was not able to remember the date of the conversation. Sinno was also unable to recall if anyone else was present during the conversation. However, Sinno testified that on the morning of either June 6 or June 7, 1961, he met Castellito in front of the offices of the Teamster's Local 560, had coffee in a local diner, and then drove with Castellito in Castellito's brown Cadillac to Lodi, New Jersey, to pick up Eddie Skowron, the individual purportedly in trouble with the authorities.

Sinno testified that after meeting Skowron, the group proceeded to Castellito's home in Kerhonkson, New York, where another alleged accomplice, Salvatore Briguglio, was hiding behind the entrance door. Sinno stated that as Castellito entered the house, Briguglio hit Castellito twice over the head with an 18 inch lead-filled hose.**

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* Sinno testified that Castellito was a friend of his, but agreed to participate in the killing as Provenzano was a better friend.

** No blood or other matter was found to corroborate any such injury.

Sinno claimed that while Castellito lay on the floor, Konigsberg pointed a .38 caliber revolver at Castellito, left the room momentarily and then returned with a venetian blind cord at which time Sinno and Briguglio proceeded to strangle Castellito.*

Sinno then testified that while preparing to bury Castellito in the woods nearby, George Vangelakos returned to the house stating that someone had called out to him while he was digging the hole.** On cross-examination Sinno stated that he never saw "the Greek" dig a hole and did not recall how he learned that "the Greek" was digging a hole. Sinno stated that the body was then placed in the trunk of the cadillac, after which Konigsberg, Sinno, Briguglio, Skowron and

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* Initially, Sinno stated that petitioner and Briguglio strangled Castellito. After he was promised immunity Sinno stated that he and Briguglio strangled Castellito.

** George Vangelakos, known as "the Greek", denied being present in Kerhonkson, New York with Sal Briguglio, Eddie Skowron, Salvatore Sinno and Konigsberg and further denied digging a hole in which to bury Castellito.

"the Greek" went to the house of the farmer who called out to Vangelakos, where they met the farmer's wife and children. Sinno testfied that they spoke to the farmer about available land in the area and asked if he knew of any property for sale. The farmer then showed them some available bungalows.

Sinno testified that they then drove back to New Jersey and buried Castellito's body in Freehold. Sinno testified that after he started cooperating with Federal authorities in 1976, he took the FBI and police to the alleged burying gound in search of Castellito's body, however, no body was found.

Sinno stated that during the summer of 1961, Provenzano said he was going to kill Konigsberg and Briguglio. Sinno claimed that as a result of Provenzano's statement, he became frightened and left Hoboken and went to Milwaukee. Thereafter, he left Milwaukee and went to Fond du Lac, Wisconsin as the Internal Revenue Service was conducting an investigation into his finances. Sinno stated that he remained in Fond du LAc

until contacting the FBI in 1976. Sinno claimed that he called the FBI as result of phone calls his wife made to New Jersey which Sinno feared might allow Provenzano to find him. However, before calling the FBI, Sinno reached out to Provenzano requesting $25,000. Sinno testified that when the money was not forthcoming, he called the FBI.

JOHN NADRATOWSKI

The prosecution's so-called corroborating witness was John Nadratowski. Nadratowski testified that in early June, 1961, he happened to notice that a Chevrolet was parked on the side of the road in a rural, heavily wooded area.* Nadratowski claimed that as he approached the vehicle, he heard digging sounds. Nadratowski testified that he blew his car horn and called out in attempt to get attention. Hearing nothing, Nadratowski drove back to his home. Thereafter, Nadratowski returned to the

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* The car was parked approximately one and a half miles from the Castillito property. Nadratowski never saw Konigsberg on Castellito's property.

car, looked inside for some identification, then wrote down the license plate number, which was later traced to Teamster's Local 560.*

Nadratowski testified that while attempting to locate the owner of the abandoned car, he met a man driving a beige Cadillac, who he later identified as Konigsberg. Nadratowski stated that Konigsberg showed Nadratowski identification and stated that his friends were looking for some property to buy. Nadratowski brought three men** back to his home to meet his wife and his family and then proceeded to show then some property for sale.

Nadratowski reported his observations to the state police at 2:00 a.m. six days later on his return from a visit to New Jersey, where he claimed that he saw a news flash that said Anthony Castellito, who has a home in Kernhonkson, was missing.

As a result of Nadratowski's statement to the police,two searches were

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* Nadratowski's brother was a member of this same Teamster's Local.

** Sinno testified that all five men went to meet with Nadratowski.

conducted in and around the Castellito property. The first search of the grounds was conducted on June 12, 1961 by Nadratowski, Officer Michael Lisman and State Trooper Shorter of the Ellenville police force. Nothing unusual was found. Nonetheless, on June 15, 1961, the property was searched again, this time by a detail of thirty State Troopers and again nothing was found which would evidence a crime having been committed (e.g. broken windows, screens or locks, or fresh digging of a grave).*

During the course of the investigation, Officer Lisman showed Nadratowski and his wife some photographs. Lisman testified that Nadratowski identified Konigsberg and Sinno from the photographs. Nadratowski's wife was unable to identify any of the individuals who had come to her home.

ANTHONY CASTELLITO

The prosecution called Anthony

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*To illustrate the thoroughness of the search, a rock with dried blood was found on the Castellito property. The blood was later determined by police laboratory to be animal blood.

Castellito, Jr., the son of the purported victim, to testify. Castellito Jr. testified that he last saw his father the weekend before June 5, 1961. Although the police found no evidence of a crime, Castellito testified that on the second weekend following his father's disappearance, which was reported by Castellito on June 7, 1961, he noticed that the tool shed lock was broken and that a window screen was cut. Castellitohad previously testified that he did not recall whether the screen had been broken before June 5, 1961. Castellito testified that a month before his father disappeared, two men indentifying themselves as FBI agents came to his house looking for his father. Thereafter, at a local 560 Teamster meeting, he recognized one of these men as being Salvatore Briguglio. Castellito did not report the incident to the police.

THE PROSECUTION SUMMATION

Mr. Konigsberg represented himself

at trial and delivered a long summation to his own behalf that did attack the prosecution's case. However, when he wished to, the prosecutor objected to Mr. Konigsberg's comments and those objections were often sustained.

From the very outset of his summation, the prosecutor geared his argument on emotion, not to reason, and went on to compel an astounding number of improprieties.

> I must tell you that because of my Irish background, I tend to become somewhat emotional. I must also tell you that this is no way I can adequately supress [sic] to the rage that I feel.

The prosecutor the proceeded in the same vein:

> The rage that I feel, because of the charges, the allegations, the insinuations that have been made in this courtroom, and your feeling about these charges and insinuations may very well be reflected by the decision you arrive at in this case. In addition, in this case more than any other, I have a keen sense of the responsibility that I owe to the people I represent.
>
> * * *
>
> Oh, Yes, in every criminal case the district atttorney represents all the people of Ulster County, and usually that takes, the form of a

> victim, and its not hard to identify with a victim.
>
> In this case, I speak for the Castellito family, I hope I'm adequate enough. More importantly, I speak for John Nadratowski, a man who cared, a man who had the courage to become involved, a man who had been pillare to the post in this courtroom because he had the courage to take the witness stand, he had the courage to expose himself to cross-examination. For what? because he cared about his community, he cared about his neighbors, he cared about observations that he made back that he made back in 1961.
>
> He had guts to become involved, and he paid a terrific price for it in the courtroom, and the only one left to speak for him is me. That is an awesome responsibility.
>
> * * *
>
> John Nardratwoski's reputation, the family of Anthony Castellito, I speak for them all.
>
> * * *
>
> ... and I give you my promise that I will attempt to make it (summation) a reasonable and candid discussion...

After these prefatory emotional and prejudicial comments, the prosecution pressed on, vouching for his witnesses and attacking Konigsberg.

> ...Anthony Castellito has been branded a liar. This

> man (Konigsberg) is not satisfied with killing his (Castellito's) father, he has branded him a liar....
>
> * * *
>
> John Nadratowski - shame, shame on Mr. Konigsberg for what he tried to do to that man on the witness stand. Ulster County resident, a person who has lived here over twenty years - I don't know if John Nadratowski would do this again. I don't know if he would have the courage today, knowing what has transpired here, if he would have gone to the police, if he would have chosen to become involved, if he would have, but, you know folks, Mr. Nadratowski is an Ulster County resident who happened to be, excuse the phrase, in the wrong place at the wrong time.
>
> Ask yourself - that could have been you. Ask yourself if you would put yourself throught the ordeal that the man went through...
>
> Ladies and gentlemen, to acquit this defendant, you've got to disbelieve the testimony of John Nadratowski.

The prosecutor went on to further inject emotion and, in many instances, testified as to why certain witnesses were not called. In explaining why Mrs. Nadratowski, also a witness to the suppose meeting with Konigsberg, was not called, the prosecutor, in effect, testified:

> What happened to him (Nadra-

towski) in this courtroom, did you honestly think I could have put his wife through that? Do think Nadratowski would have allowed me to bring his wife in here and subject her to the same sort of cross-examination that he went through!

Do you think that I could have called Mrs. Castellito? Imagine if it was you and it was your husband who was missing, your husband who you believed murdered, and a prosecutor asked you to take the stand. You know there is room for a heart in this courtroom. If these people would have contradicted that testimony, there wouldn't have been any question they would have been here, but they weren't called because the injustice done to those two families - enough is enough, and I'm not going to be part of that sort of an assault and that sort of conduct in a courtrrom, and that is why they weren't called and for no other reason.

You know, Anthony Castellito - that poor kid - are talking about his father, and he has to confront and be questioned by the man who killed his father. Can you imagine what went through his heart and mind as he is on that stand? Can you imagine what he feels like today who he has been branded a liar?

He's not only been victimized in 1961, he was also victimized here again in the courtroom ... It's awful. It is shameful. I'm sorry. I - I speak for these people I'm sorry. (Emphasis added)

After these emotional statements

and his testimony, which advised the jury why certain witnesses were not called* and which in addition, advised the jury that the testimony of the uncalled witnesses would have been the same as the witnesses who were called, the prosecutor then outrageously suggested that Mr. Konigsberg might have killed Nadratowski, if he had known of him in 1961.

> ...If Konigsberg had known that back in 1961, John Nadratowski - John Nadratowski may very well not have been in this courtroom.

The prosecutor then turned his focus upon Mr. Konigsberg personally:

> What do we know about Harold Konigsberg... My concern in this trial is his (Konigsberg) appearance before you, let me be candid. My concern is that your deliberations won't be based upon what developed on that witness stand but what happened in this courtroom and his appearance. Let me tell you something right now. That is not the real Harold Konigberg. The person that you saw in this courtroom, who is concerned about his religion and his family, is not the Harold Konigsberg of 1961. Harold Konigsberg is a hired killer. He is a shylock.
>
> You know, we don't know a great deal about him, but by his conduct during this trial and by

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* The prosecution also "testified" about why George Vangelakos, an alleged accomplice, could not have been been prosecuted.

> his to dedceive you and this court time and time again, that gives you an insight into the type of person he is.

After this diatribe, the prosecutor conceded that it was proper for Konigsberg to "go after" Sinno "...God forbid, you can understand." After this concession, the prosecutor urged the jury to hold against Mr. Konigsberg his examination of other witnesses, pointing out that: "He (konigsberg) is laughing now. He is laughing." Again, the prosecutor bolstered his witness by "testifying" that Joseph Mosner had not been prepared to answer Mr. Konigsberg's question about a record on file in New Jersey because the prosecutor"...never expected that. Never in my wildest dreams did I expect him and his credibility to be challenged."

Interspersed with a disingenuos request that the jury decided the case "on the evidence", the prosecutor advised the jury that petitioner cared as much for the life of Anthony Castellito as he did about some crackers he had in Court the day before.

In closing, the prosecutor reminded

the jury how painful it had been to give his summation because he had the burden of being the only voice for the victim, his family and the witness at trial, who appeared here"... to put it on the line" and went on the emphasize that the case had been a nightmare for Mrs. Castellito, her children and local 560.

After summation, Konigsberg moved for a mistrial on the ground that the prosecution had injected emotion rather than reason into the case and that the prosecutor implied by his argument that Mr. Konigsberg should have taken the stand and shown his "real" self. The motion was denied.

THE THIRD PARTY JUROR CONTACT

During the trial, immediately prior to summations, the Court advised both sides that juror (Karen Baymore, #2) had reported to the Court that she had received a telephone the night before. The call was made by someone who said that he was calling from the Orange County Correctional Officers, or

something similar. Baymore hung up, but the man called back and told her that, "We would like you to convict Harold Konigsberg." Other jurors came forward with similar information. The Court indicated that it would conduct an inquiry into the matter to insure that the jury had not been contaminated.

After a charging conference, the court conducted its inquiry. The first juror questioned was Baymore, who related that she had been called, that someone said he was a correction officer at the Orange County Correctional Facility, that the officer had a problem with Harold Konigsberg and that they wanted the juror to find Mr. Konigsberg guilty as charged. Konigsberg requested permission to ask a few questions at a later time. Apparently, the Court granted this request because the judge asked Baymore to step outside to see if there would be any more questions. The court then indicated, at the district attorney's suggestion, that it would ask all the questions, but that Mr. Konigsberg could request that certain questions be asked.

Baymore was recalled and asked if the call had caused her to form an opinion as to Mr. Konigsberg' guilt or innocence. Baymore stated that it had not and that she would keep an open mind and had not acquired any information which would prejudice her. The court was quite satisfied with Baymore's response.*

The next juror questioned was Mrs. Howland, who told the Court that she received a call from a man who said he was a corrections officer from Napanoch and that they needed her help to convict Konigsberg. She hung up. She advised the Court that the call would not affect her in any way.**

Next, Mr. Grube told of a similar call, but one which added that Mr. Konigsberg was a bad person. Mr. Grube also said the call would not influence him.

Mrs. Lowry also received a similar calls and also stated that she would be affected.

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* Mr. Konigsberg was not satisfied with the responses and specifically referred to the fact that the jurors had been advised that he was a prisoner.

**The trial being held in a small community, it appears that the jurors knew some of the court personnel; e.g. "Barbara", the Court Officer.

Mr. Blakely was told during a call that he should be a good citizen and convict Konigsberg. He also stated that the call would not influence him.

Mrs. Ferrari's* husband relayed a message to her that a corrections officer had "suggested" that if she wanted to "remain up here" to be sure to convict appellant. A later call by a man, calling himself Bobby Godell, repeated this threat directly to her. Mrs. Ferrari also went through the ritual of denying any impact of the call.

Mr. Koskie also received such a call, and also denied that it would influence him. However, despite the Court's making light of the matter (referring to the caller as "some Kook"), Mr. Koskie was obviously upset by the call and had some fear.

The other jurors did not receive any such calls or did not admit to receiving them.

Mr. Konigsberg pointed out that as to Mrs. Ferrari, there was an implicit threat, so the Court called her back for

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* An alternate juror.

a few questions. Upon such questioning, Mrs. Ferrari said that she did not "think" that she was frightened by the call.

Mr. Konigsberg then objected to the Court's procedure in questioning the jurors as being incomplete and inadequate. Mr. Konigsberg reiterated his objections and concerns bout the depth of the judicial inquiry and requested a mistrial, which was denied.

Konigsberg made a post-verdict request for further inquiry and, specifically, further inquiry into the jury's knowledge that he was a prisoner.* The court denied this request, erroneously stating that it had already gone into the matter.

The trial court instructed the prosecutor to investigate these improper contacts with the jury. The prosecutor made only the most superficial inquiry and reported that he found no evidence of the source of these calls.

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* This inquiry was all the more important as one juror had evidently seen Konigsberg in handcuffs. Konigsberg who is in his seventies, has been in prison for more than 25 years.

REASONS FOR GRANTING THE WRIT

POINT I

THE PROSECUTION SUMMATION DENIED KONIGSBERG A FAIR TRIAL (U.S. CONST., AMDT. V AND XIV

The role of a prosecutor as an advocate is limited by his responsibility to, above all, seek justice and not merely seek a conviction. Code of Professional Responsibility of the New York State Bar Association, EC7-13.

The Supreme Court of the United States has defined a prosecutor's role as being:

> ...the representative not of an ordinary party to a controversy, but of sovereignty whose obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is, in a peculiar and very definite sense, the servant of the law. The two fold or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88 (1934).

In light of the trial court's willingness to act to correct any of Konigsberg's improper comments many of the "retaliatory" comments of the prosecutor were totally unnecessary. It was improper for the District Attorney to sit back while the pro se accused gave his summation and then exploit any perceived improprieties, rather than objecting and seeking the Court's assistance. Thus, while a prosecutor may respond to defense arguments and may hit hard, United States v. Wilkinson, 754 F.2d 1427 (2d Cir. 1985) cert. denied, 105 S.Ct. 3482, United States v. Praetorius, 622 F.2d 1054 (2d Cir. 1979), cert. denied, 449 U.S. 860, United States v. Clark, 613 F.2d 391 (2d Cir. 1979) cert. denied, 449 U.S. 820, a prosecutor cannot disregard his obligation to see justice done and he may not make improper comments with impunity. See, United States v. Walker, 835 F.2d 983 (2d Cir. 1987).

Any fair review of the prosecutor's summation indicates that he went far beyond proper bounds and did deny Konigsberg a fair trial.

Not every impropriety made during a prosecution summation requires the grant of a new trial. The issue is whether those remarks denied the accused a fair trial or whether those remarks constituted a constitutional violation which substantially prejudiced the accused. United States v. Clark, 613 F.2d 391 (2d Cir. 1979), cert denied, 449 U.S. 820; United States v. Friedman, 909 F.2d 705 (2d Cir. 1990), Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991), Donnelly v. DeChristopher, 416 U.S. 636, 642 (1974).

The incredible summation by the prosecutor denied Konigsberg a fair trial.

A. Inflammatory Remarks

A prosecutor may not properly resort to arguments menat or calculated to inflame or prejudice the members of the jury. ABA, Standards for Criminal Justice, 3-5.8 (c)(2d Ed. 1987); United States v. Peterson, 808 F.2d 9696 (2d

Cir. 1987).

Here the prosecutor resorted to name calling and abusive rhetoric to the effect that Mr. Konigsberg was a shylock and a hired killer, who cared not a cracker crumb for human life who was trying to fool the jury while laughing at them. Further, that what Mr. Konigsberg had done in cross-examining certain witnesses was evil, awful, wrong and inhuman, with the clear implication that this was a hateful man, who did hateful things in the courtroom. See, People v. Fogerty, 86 A.D.2d 617 (2d Dept., 1982). All in contrast to the prosecutor who would not call certain witnesses because he had a heart and could not subject them to this vile treatment.* Such arguments have been universally condemed. United States v. Markham, 191 F.2d 936, 939 (2d Cir. 1951); Viereck v. United States, 318 U.S. 236, 248 (1943); United States v. Goodwin, 492 F.2d 1147 (5th Cir. 1974).

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*This was especially disingenuous as the prosecutor must have been aware that the first conviction had been reversed because the defense had been deprived of the right to go into the very area to which the prosecutor here referred. People v. Provenzano, 79 A.D.2d 811 (3d Dept. 1980).

So too, the imputation to Konigsberg that he would have killed Nadratowski if he had known of him in 1961 was a flagrant effort to poison the jury with irrelevant statements suggesting that Konigsberg had a violent nature.

Also, the prosecutor's comments about Nadratowski being a resident of the Ulster County community and his reference to Mr. Konigsberg's accusation of impropriety as being made against "their [the Jury's] officials" were all improper and designed to create an "us" and "them" mentality, with outsiders to be given short shrift. See, People v. Dordel, 55 N.Y.2d 954 (1982).

B. Comments on the Defendant's Failure to Take The Stand

During his summation, the prosecutor repeatedly referred to the fact that the Harold Konigsberg acting as his attorney was putting on an act and was not the real Harold Konigsberg and that the real one should stand up. When Kongsberg objected, that Court immediately understood what inference was

to be drawn from the comment, but despite the clarity of the inference, the Court overruled the objection.

The Apellate Division dealt with this impropriety in a one sentence conclusion without analysis or reasoning: "...the prosecutor did not improperly comment on or refer to defendant's failure to take the stand." So, too District Court and Court of Appeals are wrong.

References, either direct or indirect, to the failure of defendant to testify are among the most serious wrongs that a prosecutor can commit and in the absence of curative instructions require reversal. Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Perry, 643 F.2d 38 (2d Cir. 1981). Here, as understood by the trial court, the prosecutor was commenting on Konigsberg's failure to testify when he called for the real Harold Konigsberg to stand up.*

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* This case does not present a situation where comment on defendant's failure to testify was made as a response to an assertion that Konigsberg was denied the right to present his view of the case by the prosecution. United States v. Robinson, 108 S.Ct. 864 (1988).

C. Bolstering Credibility

The prosecution made it very clear that he spoke for the victim, his family, and the prosecution witnesses. In their name he couched for their credibility. As to the key witness, Mr. Nadratowski, the jury was told that the only reason he was there was becaused he "cared" about his (and their) community and his neighbors and that "there is no reason, no reason in the world to disbelieve" Nadratowski. Also, that any problems that Mr. Mosner had in answering Konigsberg's question arose because the prosecutor had not forseen Konigsberg's vile tactics and had not prepared Monser for them. All such vouching is improper. United States v. Modica, 663 F.2d 1173 (2d Cir. 1981); United States v. Garza, 608 F.2d 659, 662 (5th Cir. 1979); United States v. Enoch, 650 F.2d 115, 116 (6th Cir. 1981).

The single most serious impropriety in vouching, relates to the prosecution's comments about Mrs. Castellito and Mrs. Nadratowski. The prosecutor improperly

advised the jury as why these and other wirtnesses were not called. Not only was he referring to matters not on the record, but the comments also were loaded with emotion* and theatrics (i.e. "I couldn't put them through this ordeal, I have too much heart)." Even more significant, is that in explaining to the jury why these witnesses were not called, the prosecutor verified the testimony of the witnesses he did call, by telling the jury that if the uncalled witnesses had testimony different than these who were called those uncalled witnesses would have taken the stand. In so doing, the prosecutor improperly advised the jury that there were other witnesses who further sustantiated the version of those witnesses who testified and that only reason they were not called at the trial was that it would have been inhumane to put them through the ordeal of appellant's vicious cross-examination. See, Gradsky v. United States, 373 F.2d 706, 709-10 (5th Cir. 1967); Leary v.

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* The prosecutor conceded, that if not actually in tears during his argument, he was close to it.

United States, 383 F.2d 851, 865 (5th Cir. 1967); United States v. Wiley, 534 F.2d 659, 664 (6th Cir. 1976).

D. Denigration of the Defense

A prosecutor has latitude in addressing the defense presented, but it is improper to ridicule or abuse the making of that defense. Here, Mr. Konigsberg had every right to cross-examine the witnesses against him. These witnesses were protected by the prosecutor's right to object to improper questions and the Court's duty to prevent unfair questions or badgering. It was entirely wrong for the prosecutor to tell the jury that what Konigsberg did in conducting his examinations was awful, harmful, and was victimization of poor victims.* See, Harrell v. State, 114 Tex.Crim. 412, 413, 24 S.W.2d 47; Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1985).

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* During this argument the prosecutor also commented on his personal belief in Mr. Konigsberg's guilt, "...he has to be questioned by the man who killed his father." United States v. Modica, supra.

It would be difficult to conceive of a more improper summation. This closing argument is a compendium of errors, including; appeals to emotion, personal vouching, commenting on matters outside the record, denigration of the defense, name calling, and comments on a defendant's failure to take the stand, among others.

As to all of them, the prejudicial impact was heightened by the trial court's failure to sustain the objections, which not only permitted the comments to continue, but gave the jury the impression that they were proper. See, Garafola v. Coomb, 804 F.2d 201, 206 (2d Cir. 1986).

In the decision below, the District Court essentially found that Konigsberg's summation opened the door. While petitioner has conceded that some of his comments were improper, a prosecutor is not permitted to make improper reply comments with impugnity. United States v. Walker, supra; United States v. Ebens 800 F.2d 422 (6th Cir. 1986, United States v. Reynolds, 801 F.2d 953 (7th

Cir. 1986), United States v. McCoy, 771 F.2d 1207 (9th Cir, 1985).

The court of Appeals merely found that in the Context of the entire trial, summation, and the evidence the comments of the prosecution were not substantially prejudicial. Contrary to the Court of Appeals opinion, this case was paper thin. The case rests almost entirely upon the testimony of Mr. Sinno, who had ample reason to lie. While in federal courts, the testimony of an accomplice need not be corroborated, still such testimony is inherently unreliable. United States v. Slocum, 695 F.2d 650 (2d Cir. 1982) cert denied 103 S.Ct. 1260.

The requirements that the prosecution's improper comments must rise to the level of a denial of a fair trial, has here been met and then some. United States v. Modica, supra.

It is well to note here the comments of Judge Jerome Frank in his decision in United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946), cert denied, 329 U.S. 742:

> This court has several times used vigorous language in denouncing government counsel

> for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offenses, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect, Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend rules. If prosecutors win verdicts as a result of "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasures. The deprecatory word we use in our opinions on such occasions are purely ceremonial. Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of ritualistic verbal spanking. The practice of this court -- recalling the bitter tears by the Walrus as he ate the oysters -- breeds a deplorably cynical attitude towards the judiciary. Id. at 661.

As a result of the prosecutor's improper summation, the writ should be granted.

POINT II

APPELLANT WAS DEPRIVED OF A FAIR AND IMPARTIAL JURY AND WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW UNDER

THE FEDERAL CONSTITUTION AS A RESULT OF IMPROPER THIRD-PARTY COMMUNICATIONS TO SEVERAL JURORS. (U.S. CONST. AMEND. V, VI, XIV)

In light of the seriousness of the charges, the calls to these jurors could not be dealt with adequately in the few questions asked by the court and the simplistic answers of the jurors. Furthermore, the pro forma answers of the jurors required additional scrunity in light of Konigsberg's offer of proof as to the falsity of some of the juror's responses during the voir dire.*

As a result of the contamination of the jury, Konigsberg was deprived of his right to a fair trial and to a fair and impartial jury. Accordingly, he should be granted a new trial.

The Sixth Amendment right to a trial by jury guarantees to a criminally accused a fair trial by a panel of

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* While technically not part of this record, it should be noted that several of the jurors lied during their vior dire. For example, Mrs. Lowry denied knowing any law enforcement officers. Konigsberg has an affidavit from a George Armstrong, a correctional officer at the facility in which Konigsberg was then lodged, to the effect that he knew Mrs. Lowry all of his life. Also, Juror Thorpe did not mention that he had a previous arrest record, which he has.

impartial, "indifferent" jurors. Irvin v. Dowd, 366 U.S. 717, 722 (1961); Turner v. Louisiana, 379 U.S. 466,471 (1965). Even if only one juror is unduely biased, prejudiced, or improperly influenced, the Sixth Amendment right to an impartial jury is denied to a criminal defendant. United States v. Rateni, 480 F.2d 195 (2d Cir. 1973); United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979); United States v. Hendrix, 549 F.2d 1225,1227 (9th Cir. 1977), cert. denied, 434 U.S. 818; Thacher v. Cox, 309 F.Supp. 101 (E.D. Va. 1970). See, United States v. Moten, 582 F.2d 654, 659 (2d Cir. 1978) [Moten II]; Sullivan v. Fogg, 613 F.2d 465, 467 (2d Cir. 1980); United States v. Intersimone, 512 F.Supp. 302 (S.D.N.Y. 1981) (Owen, J.).

While the Supreme Court has not yet specifically held that only "one juror" need be tainted for a defendant's right to an impartial jury to be violated, the language used by the Supreme Court in Remmer v. United States, 347 U.S. 227, 229 (1954) leaves no room for doubt.

> In a criminal case, any private communication contact, or tampering,

> with a juror during a trial about the matter pending before the jury, is for obvious reasons, deemed presumptively prejudicial. The presumption is not conclusive, but the burden rests heavily upon the government to establish ...that such contact with the juror was harmless to the defendant . Id. at 229 (emphasis added).

Therefore, where even a single juror is "improperly influenced", a new trial should be granted.

The question then becomes what type of "improper influence" or "prejudice" or "bias" will require a new trial. The test is whether the accused received a fair trial. United States v. Bando, 244 F.2d 833, 848-849 (9th Cir. 1974). There can be no doubt that the "improper influence" alleged here denied the accused a fair trial.

In Peter v. Kiff, 407 U.S. 492 (1972) and Smith v. Phillips, 102 S.Ct. 940, 946 (1982), the Supreme Court, in the context of a motion made pursuant to 28 U.S.C. Sec. 2254, stated that "due process" means a jury capable and willing to decide the issue solely on the evidence before it". 102 S.Ct. at 946;

Rogers v. McMullen, 673 F.2d 1185, 1188-1189 (11th Cir. 1982).

As noted above, under Remmer, there is a heavy burden on the prosecution to establish that the private communications were harmless to the accused. One way to establish harmlessness is to conduct a full voir dire hearing. United States v. Aiello, 771 F.2d 621, 629 (2d Cir. 1985). Here, the inquiry by the Court, did not meet this burden.

In People v. Sher, 24 N.Y.2d 459 (1969), cert denied, 396 U.S. 837, the Court of Appeals held that questioning the jurors who were contacted may, under certain circumstances, remove the possible harm from the communications. However, as brought out more fully in Sher v. Stoughton, 666 F.2d 791 (2d Cir. 1971), the communications is Sher's case were very different from those presented here. In Sher, there was no issue as to guilt, as the defense was insanity. Thus, the prejudice arising from a call stating that defendant was guilty had very little impact as there was no question that Sher committed the crime

for which he was charged. Here, the issue was guilt or innocence and the impact of the calls is far greater than in Sher. Further, the calls in Sher were anonymous. Here, some of the calls were anonymous as to name, but not as to official employment of the caller in that the caller identified himself as a corrections officer. Indeed, in one of these calls the caller not only stated that he was a corrections officer, but gave a name. This fact renders this case more similar to Parker v. Gladden, 385 U.S. 363 (1966) than to Sher. In Gladden, the communication was made by a bailiff* and required reversal of the conviction. While the trial court, in its inquiry of the jurors, tried to dismiss the caller as deranged, it must be remembered that this was an aware, organized caller, with knowledge of the home phone numbers of several jurors and some personal information as well. The jurors might not have been sure that the caller or callers

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* The court's efforts to convince the jurors that the callers could have been anyone and the juror' pro forma answers do not alter the fact that these were not anonymous calls, but on their face were made by state employees.

were state officials or employees, but they also could not be sure that they were not.

Further, the nature of the calls advised the jurors of the probability that Mr. Konigsberg was in jail, an extremely prejudicial fact. The questioning by the court did nothing to explore or alleviate this prejudice.

Finally, as to juror Ferrari, the caller knew she was not from the area and that the communication contained an implied threat that she should convict if she wanted to "remain up here". Indeed, Mrs. Ferreri understood this as a threat and, at most could say that she did not "think" that she had been frightened by the caller.*

The opinion below short shrifts this serious issue by incorrectly stating that each juror clearly stated that they would not let the calls influence them. The record shows no such clarity.

Again, regarding the fact that the juror were advised that Konigsberg was then incarcerated, the State Court merely

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* Juror Koski also expressed some concern and fear about the call.

clothes speculation as a conclusion "...it came as no surprise to those jurors contacted... that he [Konigsberg] was incarcerated."

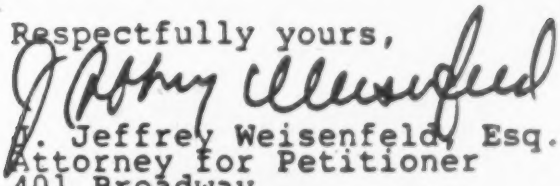
Finally, in its efforts to distinguish this case from Parker v. Gladden, 385 U.S. 363 (1966), the State Court and District Court and the Court of Appeals totally neglect the fact that the callers identified themselves as correction officers "ostensibly clothed with the authority" of a peace officer and that there was no proof that the caller's self identification was incorrect. Thus, this case is very similar to Parker, and cannot be dealt with in such an off-handed way.

In fact, these calls were very prejudicial and the brief ritualistic procedure followed by the Court was totally inadequate to resolve the issue properly. Konigsberg was denied a fair trial and this writ should be granted.

CONCLUSION

THE WRIT SHOULD BE GRANTED.

Respectfully yours,



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the Twenty-fourth day of September one thousand nine hundred and ninety-two.

Present:

HONORABLE AMALYA L. KEARSE,

HONORABLE GEORGE C. PLATT,

HONORABLE JOSEPH M. McLAUGHLIN,

Circuit Judges,

HAROLD KONIGSBERG,

Petitioner-Appellant,

-v-

ROBERT H. KULHMAN, Warden, Sullivan Correctional Facilty,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern

District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the order of said District Court bne and it hereby is affirmed.

Petitioner Harold Konigsberg, a New York State prisoner, appeals from an order of the United States District Court for the Northern District of New York, Con. G. Cholakis, Judge, dismissing his petition for habeas corpus, On appeal, Konigsberg principally pursues his contentions that he was denied a fair trial by the prosecutor's summation and by improper third-party communications to jurors. We find no ground for reversal.

A challenge to the prosecutor's summation must be evaluated in light of the summation as a whole and of all that occurred at the trial. See, United States v. Socony-Vacuum Oil Co., 310 U.s. 150, 239, 242-43 (1940); United States v. Bivona, 487 F.2d 443, 447 (2d Cir. 1973). For example, a prosecutor is ordinarily entitled to respond to the evidence, issues, and hypotheses propounded by the

defense, see, e.g., United States v. Marrale, 695 F.2d 658, 666-67 (2d Cir. 1982), cert. denied, 460 U.S. 1041 (1983); United States v. Miller, 478 F.2d 1315, 1318 (2d Cir.), cert. denied, 414 U.S. 851 (1973), or to comment on a defendant's failure to call witnesses to contradict the factual character of the government's case, so long as he does not comment on the failure of the defendant to testify. United States v. Bubar, 567 F.2d 192, 199 (2d Cir.), cert. denied, 434 U.S. 872 (1977). Improper remarks in the summation "must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." United States v. Young, 470 U.S. 1, 12 (1985); see, United States v. Nersesian, 824 F.2d 1294, 1327 (2d Cir.), cert. denied, 484 U.S. 958 (1987). "Whether a prosecutor's improper statement during summation results in a denial of the due process depends upon whether the improper statement causes substantial prejudice to the defendant." Id. In determining whether there has been substantial

prejudice, we weigh "the severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct." United States v. Freidman, 909 F.2d 705, 709 (2d Cir. 1990). It is the rare case[]" in which improper comments in a prosecutor's summation are so prejudicial that a new trial is required. See, e.g., Floyd v. Meachum, 907 F.2d 347, 348 (2d Cir. 1990).

Though some of the prosecutor's comments challenged here by Konigsberg may have exceeded the bounds of propriety, in the context of the trial as a whole and in light of the substantial evidence from which a jury could have found that Konigsberg was guilty beyond a reasonable doubt, we are not persuaded that the prosecutor's comments resulted in a fundamentally unfair trial.

We also reject Konigsberg's contention that he was denied a fair and impartial jury, a fair trial, and due process because of improper third-party communications to jurors. After learning of the improper communications, the trial

court conducted a voir dire of the jurors and determined that they would remain impartial. The state appellate court affirmed this finding. These findings are presumed to be correct, see, Smith v. Phillips, 455 U.S. 209, 217-218 (1982), and Konigsberg has failed to rebut this presumption.

We have considered all of Konigsberg's arguements on this appeal and have found them to be without merit.

The order dismissing the petition is affirmed.

AMALYA L. KERSE
United States District Court Judge

GEORGE C. PLATT
United States District Court Judge

JOSEPH M. McLAUGHLIN
United States District Court Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HAROLD KONIGSBERG,

Petitioner,

-vs- 89-CIV-1491

ROBERT H. KHULHMAN, WARDEN, SULLIVAN CORRECTIONAL FACILITY, DISTRICT JUDGE CON. G. CHOLAKIS

Respondent.

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DAVID N. HURD
United States Magistrate Judge

REPORT-RECOMMENDATION

This matter, originally filed in and transferred from the Southern District of New York, was initially assigned for Report and Recommendation to Magistrate Judge Gustave J. DiBianco by the Honorable Con. G. Cholakis, by standing order dated August 2, 1985. The proceeding was transferred to the undersigned on January 28, 1991.

An order was issued by Magistrate Judge DiBianco pursuant to the Rules governing Sec. 2254 cases in the United States District Courts, 28 U.S.C. fol. Sec. 2254 ordering the service of an answer by the respondent. The respondent filed an answer, together with the pertinent state court records,1 and a memorandum of law. The petitioner filed a memorandum of law in response to the respondent's memorandum.

On March 14, 1991, this Court issued a Report-Recommendation recommending the petition be dismissed for failure to exhaust. The Petitioner filed his objections to the Report-Recommendation with Judge Con G. Cholakis. In a Memorandum Decision and Order dated August 19, 1991, Judge Cholakis held that all of the claims raised by petitioner in the petition were exhausted, and remanded this matter to this Court for consideration of the merits of petitioner's petition.

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1 The records submitted are listed in paragraphs 11 and 12 of respondent's answer.

Petitioner complains of a judgment of conviction rendered in the Ulster County Court on November 24, 1982, after a jury convicted him of first degree murder, upon which he was sentenced to life imprisonment. The Appellate Division, Third Department, in a written opinion dated May 12, 1988, affirmed petitioner's conviction. People v. Konigsberg, 137 A.D.2d 142 (3d Dept. 1988). The petitioner unsuccessfully sought leave to appeal to the New York Court of Appeals. People v. Konigsberg, 72 N.Y.2d 912 (1988). Petitioner's request for reconsideration of the denial of his leave to appeal was also denied. People v. Konigsberg, 72 N.Y.2d 1046 (1988).

The petitioner's contentions, as set forth in his application, are as follows:

1. The prosecution's summation denied him a fair trial;

2. He was denied a fair trial and an impartial jury as a result of improper third-party communications with several jurors;

3. The trial court's jury instruction on the corroboration of accomplice testimony denied him a fair trial and the right to a trial by jury;

4. He was unlawfully sentenced to consecutive rather than concurrent terms, in violation of his right to due process; and

5. There is insufficient evidence to support the verdict.

F A C T S

In June of 1961, Anthony Castellito, Secretary/Treasurer of Teamster Union Local 560, disappeared and was never seen again. In 1976, the petitioner, Anthony Provenzano, and Salvatore Briguglio were charged with the murder of Castellito. The petitioner and Anthony Provenzano were indicted, tried together, convicted, and sentenced to life imprisonment for the murder of Anthony Castellito. On appeal, Provenzano's conviction was affirmed, but petitioner's was reversed and a new trial ordered. People v. Provenzano, 79 A.D.2d 811 (3rd Dept. 1980). The petitioner's second jury trial was commenced in the fall of 1982. At his retrial, the petitioner chose to represent himself. The evidence to support the petitioner's indictment and conviction was provided by Salvatore Sinnio, a participant in the Federal Witness Relocation Program.

Sinnio, an unindicted coconspirator in Castellito's murder, testified that Provenzano retained the service of petitioner to murder Castellito. T.T. 1915, 1928.2 Sinnio stated that he and three others agreed to participate with the petitioner in the murder of Castellito. T.T. 1909. According to Sinnio, petitioner conceived of a plan whereby Sinnio would persuade Castellito to allow for the use of Castellito's summer home in Ulster County to hide an individual from the authorities. T.T. 1929. As part of the plan, Castellito would drive Sinnio and one of the other participants to the summer house in Castellito's cadillac, and petitioner and other participant would be waiting at the house to kill Castellito when he arrived. T.T. 1930-33. The petitioner and two other participants had gone up ahead of Sinnio and Castellito in petitioner's white and blue Chevrolet. T.T. 1933, 1939.

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2 Numbers preceded by T.T. are references to the trial transcript.

The plan went according to schedule, and when Castellito entered the house, he was struck on the head. T.T. 1936. When Castellito fell to the floor after being struck, petitioner retrieved a cord, handed it to Sinnio and another participant, and they strangled Castellito to death. T.T. 1937.

Sinnio testified that whil the murder was taking place, another of the participants was in the woods near the house digging a grave for castellito's body. T.T. 1937. Prior to taking Castellito's body to the grave site, the individual that was digging the grave, returned to the house and told petitioner and the others that a local farmer had seen him digging the hole. T.T. 1939-1940. The petitioner, Sinnio, and the other three participants, placed Castellito's body in the trunk of Castellito's Cadillac and went to the farmer's house. T.T. 1939, 1941. Petitioner met with the farmer, in the presence of the other participants, inquired about the possibility of renting some property. T.T. 1941. When

discussions about real estate concluded, petitioner and the participants got into the cars and travelled to New Jersey where they dumped Castellito's body. T.T. 1941, 1943.

In addition to Sinnio's testimony, the prosecution also presented the testimony of the farmer who had heard the grave being dug. The farmer testified that he owned property near Castellito's house, and that on the day in question, he was driving down a road by his house when he saw an unattached blue and white Chevrolet with New Jersey plates parked by the side of the road. T.T. 3258-61. The farmer stated that he stopped his vehicle, and when he exited from it he heard digging. T.T. 3261. he blew his horn and yelled, at which point the digging stopped. T.T. 3261, 3264. The farmer claimed that he became suspicious, so he wrote down the car's license plate number. T.T. 3265. The farmer testified that he returned to his car and started to drive around the immediate vicinity to see if he could find anyone. T.T. 3266. When the farmer was starting to return to

where the Chevy was parked, a Cadillac approached at a high rate of speed from the opposite direction and stopped. T.T. 3266. The farmer began a discussion with the driver of the Cadillac, asking him who he was and who owned the Chevy. T.T. 3267-68. The driver of the Cadillac told the farmer that the Chevy was owed by his friends. T.T. 3268. According to the farmer, he and the driver of the Cadillac returned to where the Chevy was parked, and sitting in the front seat were two individuals, one of which he identified as Sinnio. T.T. 3268. The farmer testified that the driver of the Cadillac was the petitioner, and that the petitioner stated he was looking for some property, so the farmer showed him some houses and land, and then brought him to his home. T.T. 3269-3271. The farmer claimed that only the petitioner did the talking during the discussion. T.T. 3271.

The farmer stated that about a week after this incident, he saw a news report that Castellito was missing. T.T. 3273-74. As a result of this news report, the farmer became suspicious and

went to the State Police to report what had occurred on the day he found the Chevy unattended, and to provide the police with a statement and the license plate number of the Chevy. T.T. 3274-76. A few days later, a State Police investigators interviewed the farmer and showed him a group of photographs. T.T. 3276. From the photographs that the farmer was shown, he made a positive identification of the petitioner and Sinnio. The proof at the trial also showed that the Chevy was registered to a business owned by the petitioner. T.T. 2677-78.

DISCUSSION

I. Prosecutor's Summation

The petitioner argues that the statements made by the prosecutor during summation denied him a fair trial. The petitioner contends that the prosecutor's references to the rage that he felt by the crime, the personal attack on petitioner, and the manner in which he criticized the way petitioner conducted the defense was entirely improper. Petitioner also claims that it was

inappropriate for the prosecutor to make statements as to why certain witnesses were not called to testify, and to then state to the jury what their testimony would have been had they testified. Petitioner also claims that the prosecutor's statement that the real Harold Konigsberg should have stood up was a reference to petitioner having not testified. Petitioner insists that the prosecutor's summation was filled with inflammatory remarks, calling petitioner names, and implying that the petitioner would have killed the farmer. Petitioner alleges that the prosecutor's comments about the victim's family were improper, and the statements about the witnesses that testified amounted to vouching for the credibility. The petitioner also alleges that it was improper for the prosecutor to tell the jury that the petitioner's cross-examination of the witness was awful, harmful, and victimization of poor victims.

Respondent argues that the prosecution's comments were in response to the remarks petitioner made in his

summation. According to the respondent, the tone and comment of petitioner's almost eight hour summation was replete with outrageous charges, allegations and negative insinuations directed at the People's witnesses. The respondent contends that petitioner made specific attacks on the credibility of the prosecution's witnesses, and stated that the reason certain witnesses were not called was because they would have committed perjury, and then challenged the prosecution to explain why they were not called to testify. The respondent alleges that it was in this context that the prosecutor's comments were made. Respondent also contends that any statements that may have made that would have been better left unsaid were ameliorated by the trial judge's repeated instructions to the jury during both of the parties summations, and again in his charge.

"A criminal conviction `is not to be lightly overturned on the basis of a prosecutor's comments standing alone' in an otherwise fair proceeding." Gonzalez

v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991) (Citing United States v. Young, 470 U.S. 1, 11 (1985)). The standard of review in a habeas corpus proceeding alleging that a prosecutor's summation was improper is "the narrow one of due process, and not the broad exercise of supervisory power". Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). "The relevant question is whether the prosecutor's comments `so infected the trial with unfairness as to make the resulting conviction a denial of due process'". Darden v. Wainwright, 477 U.S. 168, 181 (1986)(citing Donnelly, 416 U.S. 637). The prosecutor's comments during summation will result in a reversal of a conviction only when the remarks have resulted in "substantial prejudice" to the petitioner. United States v. Tutino, 883 F.2d 1125, 1136 (2d Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1130 (1990).

In determining whether the prosecutor's summation has violated the petitioner's due process rights, the court focuses on three factors "... the

severity of the misconduct, the measures adopted to cure the misconduct, and the certainty of conviction absent the misconduct." United States v. Friedman, 909 F.2d 705, 709 (2d Cir. 1990); see Blissett v. LeFevre, 924 F.2d 434, 440 (2d Cir. 1991). In assessing whether the prosecutor's statements were improper and deprived the petitioner of a fair trial, the Court must examine the remarks in the context of the entire trial. Strouse v. Leonardo, 928 F.2d 548, 557 (2d Cir. 1991); Blissett, 924 F.2d at 440.

The Court has reviewed the entire transcript of petitioner's trial. The petitioner's summation lasted almost eight hours, during which he would crumble crackers on the defense table each time he made what he believed was a salient point. The petitioner's summation not only invited some of the statements made by the prosecutor, but required responses by the prosecutor. In his summation, the petitioner made repeated attacks on the credibility of the prosecution witnesses as well as making his own suggestions as to why the

prosecutor failed to call certain witnesses. The petitioner, specifically challenged the prosecutor to explain to the jury why certain witnesses were not called. The petitioner claimed that the prosecutor had dirty hands, manipulated and manufactured evidence, created a smoke screen, and would fool and hoodwink the jury.

The Court finds that the prosecutor's statements did not deprive the petitioner of a fair trial. The prosecutor's comments in defense of his integrity, as well as that of his witnesses he called, were entirely proper in view of the petitioner's repeated personal attacks on both the prosecutor and the witnesses. United States v. LaSorsa, 480 F.2d 522, 526 (2d Cir.), cert denied, 414 U.S. 855 (1973). It was also appropriate for the prosecutor to why he did not call certain witnesses since the petitioner challenged the prosecutor to explain to the jury why they did not testify. See United States v. Benter, 457 F.2d 1174, 1176-77 (2d Cir.), cert denied, 409 U.S. 842 (1972).

The Court also does not find that of the prosecutor's statements, were an attempt at commenting on the petitioner's failure to testify. The statement which petitioner finds fault with was made by the prosecutor in order to draw the juries attention to the fact that since over twenty years had transpired between the date of the crime and the trial, that the petitioner is not the same person as the one that planned the murder of Castellito. Furthermore, the prosecutor's comments about the petitioner's grueling cross-examination of the People's witness was not an attempt at denigrating his defense, but rather an appropriate comment about the credibility of the witnesses that had been attacked by the petitioner in his summation.

The Court feels that the summations by both petitioner and the prosecutor leave a great deal to be desired. The prosecutor made comments, as respondent concedes, which would have been better left unsaid. The petitioner has conceded that he made comments which may have

prompted some of the prosecution's statements he now argues were improper. It's against this backdrop that the Court has reviewed the lengthy summations in this case. There were numerous objections by petitioner and the prosecutor during each of their adversary's summations. The trial court at different times would either sustain or overrule objections, and then follow the ruling with an instruction to the jury that the summations were not evidence, and that they were to confine themselves to the evidence when deciding the petitioner's fate. T.T. 4758, 4801. The trial court also gave the standard instruction in its charge to the jury that it was to consider only evidence properly admitted, and not what the petitioner and the prosecutor said. In veiw of the trial court's curative instruction and charge to the jury, any inappropriate statements that may have been made by the prosecutor were remedied by these instructions. See Garofolo v. Coomb, 804 F.2d 201, 206 (2d Cir. 1986).

The Court is also satisfied that

the evidence at the petitioner's trial rendered any improper statements by the prosecutor to be harmless. See Friedman, 909 F.2d at 709. The testimony of the accomplice coupled with that of the farmer made petitioner's conviction certain notwithstanding the alleged improper statements made by the prosecutor. See Gonzalez, 934 F.2d at 424.

2. Improper Third Party Communications.

Prior to summation, someone representing himself to be a corrections officer at the facility where petitioner was being confined, made phone calls to the homes of six of the jurors and alternates. T.T. 4667-68, 4674, 4675, 4679, 4682, 4685, 4687. The member of the jury that were contacted were told by the caller that they should find petitioner guilty. T.T. 4668, 4675, 4677, 4680, 4683, 4685, 4687. A member of the jury immediately notified the trial judge that she had been contacted about the case. The trial court decided that it would conduct an inquiry into the matter by questioning each juror to determine if they had been contacted.

T.T. 4655. Both the petitioner and the prosecutor agreed to this procedure. T.T. 4655.

The trial court, after determining which jurors had received phone calls, and with questions submitted by both parties, conducted a voir dire of each of the jurors that were contacted. T.T. 4670. In response to the trial court's questions, each of the jurors stated that they had not formed an opinion as a result of the call, and that they would not let the call influence their verdict. T.T. 4673-74, 4675, 4678, 4681, 4683, 4686, 4689. At the conclusion of the trial court's interview of the jurors, the petitioner objected to the court's questioning of the jurors on the grounds that it was incomplete and inadequate, and that he was concerned about the jurors having been told by the caller that he was a prisoner. T.T. 4695, 4699. Petitioner made at least two request for a mistrial, both of which were denied. T.T. 4718, 4906.

Petitioner contends that in view of the seriousness of the charge and the

inadequate questioning of the jurors by the trial judge, he should be granted a new trial. The petitioner also contends that the jurors' responses to the questions were suspect and required additional scrunity by the trial court.

The Supreme Court has held that "... any private communication, contact, or tampering with the jury...is deemed presumptively prejudicial." Remmer v. United States, 347 U.S. 227, 229 (1954). The state may overcome the presumption by showing that the communication was harmless. Id., at 229. Every third party contact with a juror "does not require a new trial every time a jury has been placed in a potentially compromising situation". Rushen v. Spain, 464 U.S. 114, 118, (1983)(per curiam)(quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).

The appropriate response when atrial court discovers that there has been an unauthorized third party communication with a juror is to conduct a voir dire hearing in the presence of all interested parties. United States v.

Aiello, 771 F.2d 621, 629 (2d Cir. 1985). The purpose of the hearing is for the trial court to inquire of each juror, the circumstances of the communication, the impact on the juror, and whether or not it was prejudicial. Remmer, 347 U.S. at 229-30. If a state court has conducted a vior dire hearing concerning a third party contact with a juror, then a federal court will accord the state court's finding a presumption of correctness. Smith, 455 U.S. at 218 (1982)(citing Sumner v. Matta, 449 U.S. 539, 551 (1981)).

In the instant case, when the trial court became aware that a third party had contacted a juror, it conducted a vior dire hearing in the presence of the petitioner and the prosecutor. The hearing in the presence of the petitioner and the prosecutor. The court permitted each party the opportunity to submit questions for the juror to answer concerning the third party communication. The trial court individually questioned the jurors as to what the caller had said, and then

determined whether it had affected their impartiality. Satisfied with each of the juror's responses to the questions, the trial court found that no prejudice had occurred, and that the jury was capable of rendering an impartial verdict. See Patton v. Yount, 467 U.S. 1025, 1036 (1984). In view of what the caller told the jurors, the trial court's findings, and the failure by the petitioner to come forward with convincing evidence that these findings are incorrect, the petitioner's claim must be rejected. See Sher v. Stoughton, 666 F.2d 791, 795 (2d Cir. 1981).

3. Jury Instruction on Corroboration

The petitioner argued that the trial court's jury instruction on accomplice testimony violated his due process rights. Specifically, the petitioner claims that the following statement by the Court was incorrect: "The testimony of John Nadrotowski [the farmer] if it is believed by you, may constitute corroborative evidence in this case". The petitioner argues that this instruction removed from the jury the

issue of whether Nadrotowski's testimony, if believed, was enough to convict. The petitioner concedes that the above quoted statement had followed the court's credibility instruction. However, he argues that his conviction must be reversed since the Court's charge to the jury was capable of two different meanings.

The Second Circuit has stated that:

> In order to obtain a writ of habeas corpus in federal court on the ground of error in a state court's instructions to the jury on matters of state law, the petitioner must show not only that the instruction misstated state law, but also that the error violated a right guaranteed to him by federal law.

Blazic v. Henderson, 900 F.2d 534, 540 (2d Cir. 1990)(quoting Casillas v. Scully, 769 F.2d 60, 63 (2d Cir.1985)). "for an erroneous state jury charge to result in a federal constitutional deprivation, `the ailing instruction by itself [must have] so affected the entire trial that the resulting conviction violates due process.'" Id., at 541 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

The petitioner correctly points out that the Constitution does not require that an accomplice's testimony be corroborated. Since there is no constitutional requirement that an accomplice's testimony be corroborated, the petitioner's claim that the trial court improperly charged the jury on accomplice testimony is not subject to review in a habaes corpus proceeding. Camara v. Scully, 624 F.Supp. 106,109 (S.D.N.Y. 1985). Assuming, however, that the Court were to reach the merits of this claim, it would nevertheless find the jury instruction which petitioner complains of to be consistent with state law, and therefore, not a deprivation of his due process rights. See People v. Daniels, 37 N.Y.2d 624, 630 n.3 (1975); Konigsberg, 137 A.D.2d at 147.*

* Although the Court agrees with respondents' contention that this claim is procedurally defaulted as a result of petitioner's failure to object to the trial court's instruction, this court has nevertheless reached the merits of this claim since the District Court, in its remand, directed this Court to address the merits of the petition, and therefore, the court is constrained by that remand to reach the merits of all the claims contained in petitioner's petition.

4. Petitioner's Sentence

At petitioner's first trial, he was sentenced to an indeterminate term of imprisonment, having a maximum of his natural life. The sentencing judge did not specify whether the sentence imposed was to run consecutively or concurrently with a prior unrelated term of state imprisonment the petitioner was then serving. The petitioner was successful in having his first trial and sentence reversed on appeal. See Provenzano, 79 A.D.2d 811. Petitioner was retried, found guilty, and then sentenced to an indeterminate term of prison having a maximum of his natural life. The judge at petitioner's second trial specifically directed that the sentence would run consectively to the prior unrelated term of state imprisonment the petitioner was then serving. The petitioner argues that in view of the first judge's silence on whether his sentence should be consecutive or concurrent with the unrelated term of prison he was then serving, it was a violation of his due process rights for the judge at the

second trail to sentence him to a consecutive term.

It is well settled that when a defendant sucessfully appeals his first conviction, it is a violation of his due process rights to impose a more severe sentence if he is convicted at his second trial. North Carolina v. Pearce, 395 U.S. 711, 723-25 (1969). The central issue for resolution in this application is whether petitioner's first sentence that was reversed on appeal, was concurrent or consecutive.

Under New York law, at the time petitioner committed the murder, a sentencing court's silence as to whether the term of imprisonment was to be served concurrently or consecutively with the sentence on an unrelated conviction resulted in it being served consectively. People v. Callahan, 30 A.D.2d 691 (2nd Dept. 1968). Since the judge's silence at petitioner's first sentencing automatically made that sentence run consectively with the sentence on the unrelated charge for which he was already serving time, the sentence he received

after his second trial was the same as his first, and thus was not a violation of his due process rights.

5. Sufficiency of the Evidence.

The petitioner argues that the evidence of his guiltis insufficient to sustain his conviction. The petitioner contends that Sinnio's testimony was not sufficiently corrobotrated to support his conviction.

In assessing a claim by a petitioner that the prosecution's evidence is insufficient to establish his guilt, a federal habaes court is required to consider the trial evidence in the light most favorable to the prosecution, upholding the conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979)(emphasis in original). "This means that we must credit every inference inference that could have been drawn in the State's favor,...whether the evidence being reviewed is direct or circumstancial...." Reddy v. Coombe, 846 F.2d 866, 869(2d

Cir. 1988)(citations omitted), cert. denied, 488 U.S. 929 (1988).

Assuming, without deciding, that petitioner's contention that the accomplice's testimony was not sufficiently corroborated raises an issue which can be addressed in this proceeding, it must nevertheless, be dismissed. The testimony of the farmer, that he happened upon the Chevrolet, which was later found to be registered to petitioner's business, heard the sounds of digging, and his positive identification of Sinnio and petitioner from a photo array supplied the necessary corroboration to support Sinnio's testimony.

Accordingly, it is

RECOMMENDED, that petitioner's petition be denied.

Pursuant to 28 U.S.C. Sec. 636 (b)(1), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court with a copy to be mailed to the chambers of the undersigned at 10 Broad Street,

Utica, New York 13501. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. Smallv. Secretary of Health and Human Services, 892 F.2d 15 (2d Cir. 1989); 28 U.S.C. Sec. 636 (b)(1); Fed.R.Civ.P. 72, 6(a), 6(e), and it is

ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation, by certified mail, upon the parties to this action.

ORDERED, that the state court record herein be returned directly to the office of Assistant Attorney General at the conclusion of these proceedings. He has agreed to make the available for any appellate review.

S/ DAVID N. HURD,
United States Magistrate Judge

Dated: October 18, 1991
Utica, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HAROLD KONIGSBERG,

Petitioner,

-vs- 89-CIV-1491

ROBERT H. KHULHMAN, WARDEN, SULLIVAN CORRECTIONAL FACILITY, DISTRICT JUDGE CON. G. CHOLAKIS

Respondent.

APPEARANCES: OF COUNSEL:

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CON G. CHOLAKIS, D.J.

MEMORANDUM DECISION AND ORDER

This habaes corpus action brought pursuant to 28 U.S.C. Sec. 2254, comes before the Court on the Report-Recommendation of United States Magistrate Judge David N. Hurd, dated October 18, 1991, recommending that petitioner's petition be denied.

After careful review of the entire file, including the plaintiff's objections to the Magistrate Judge's Report-

Recommendation, the Report-Recommendation is hereby accepted and adopted in full. Petitioner's petition is hereby denied and dismissed.

IT IS SO ORDERED.

s/CON. G. CHOLAKIS,
CON. G. CHOLAKIS, JUDGE
UNITED STATES DISTRICT COURT

DATED: Albany, New York
January 3, 1992